No. 79-143

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANCISCO MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the marijuana found in the trunk of his car near the Border Patrol checkpoint at Sarita, Texas, should have been suppressed because the checkpoint is not the functional equivalent of the border and the Border Patrol lacked probable cause to search the trunk.

1. Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, followed by a special parole term of three years. The court of appeals affirmed (Pet. App. A-1 to A-5; 597 F. 2d 509).

The evidence showed that on March 18, 1978, at approximately 1:45 a.m., petitioner drove his car northbound to within 200 yards of the permanent alien checkpoint 14 miles south of Sarita, Texas (Tr. 6). There, petitioner turned his vehicle around and drove away from the checkpoint (Tr. 8). Border Patrol Officer Hill, who observed petitioner's actions, gave chase and stopped petitioner within a mile (Tr. 8, 11-12). Petitioner, who appeared very nervous, told the officer that he had turned around because he noticed that he had driven too far up the road (Tr. 9, 12-13). Officer Hill asked petitioner to open the trunk of his automobile and petitioner refused. Officer Hill then asked what the trunk contained and petitioner stated, "I think you have a pretty good idea." Officer Hill opened the trunk and discovered 293 pounds of marijuana (Tr. 10).

2. Petitioner contends (Pet. 2-3) that the Sarita checkpoint is not the functional equivalent of the border and that therefore the Border Patrol officer could not legally search his car in the absence of probable cause.

The same issue is presented in *Abrams* v. *United States*, 598 F. 2d 969 (5th Cir. 1979), petition for cert. pending, No. 79-5216, and we rely on our brief in opposition in that case to demonstrate why the court of appeals' decision regarding the characteristics of the Sarita checkpoint does not merit review by this Court.[1]

3. In any event, even if Sarita is not the functional equivalent of the border, the stop and search of petitioner's car were proper. Sarita is a permanent checkpoint, and initial stops at such places are permissible even "in the absence of any individualized suspicion."

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[1]A copy of the brief in opposition in *Abrams* has been sent to petitioner.

United States v. *Martinez-Fuerte*, 428 U.S. 543, 562 (1976). When petitioner stopped his car and turned it around a short distance before the checkpoint, the Border Patrol officer had good reason to pursue the vehicle and stop it. The further events that then transpired established the probable cause necessary to justify a vehicle search at a checkpoint that is not the functional equivalent of the border. See *United States* v. *Ortiz*, 422 U.S. 891 (1975).

Petitioner's U-turn suggested an attempt to evade an encounter with the Border Patrol. His proffered explanation for the maneuver—that he had simply driven too far up the road—was implausible in light of the fact that Highway 77 does not intersect any other road for a distance of approximately 50 miles south of Sarita. In addition, petitioner responded to Officer Hill's questioning about the contents of the car's trunk by stating that he thought the officer had "a pretty good idea" what the trunk contained. Considering these remarks as well as petitioner's nervous appearance, Officer Hill had substantial reason to believe, based on his experience as a Border Patrol agent, that petitioner was attempting to smuggle aliens or contraband into the United States. The court of appeals correctly found that the officer had probable cause to search petitioner's automobile, and this Court should not review that essentially factual conclusion. See *United States* v. *Fontecha*, 576 F. 2d 601 (5th Cir. 1978) (attempt to evade checkpoint and odor of marijuana provide probable cause); *United States* v. *Macias*, 546 F. 2d 58 (5th Cir. 1977) (U-turn at checkpoint plus heavily-loaded appearance of vehicle established probable cause); *United States* v. *Medina*, 543 F. 2d 553 (5th Cir. 1976) (probable cause established by defendant's failure to stop at checkpoint and denial of possession of key to trunk, plus odor of air freshener in car).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979